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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania utility corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTIONS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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MOTIONS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of the Supreme Court, the National Consumer Law Center, Inc. applies to the Court for leave to file the enclosed brief *Amicus Curiae* in support of the Petitioner, Catherine Jackson.

The National Consumer Law Center is a legal services technical assistance program which is to devise and implement programs of research, training, and resource assistance in support of some 2100 attorneys throughout the United States who provide direct legal services to the

poor. During the past several years, the Center has appeared before this Court as *Amicus* in *Swarb* v. *Lennox*, 405 U.S. 174 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *Mourning* v. *Family Publications*, —— U.S. ——, 36 L. Ed. 2d 318 (24 April 1973).

In the context of residential utility service, the Center has provided substantial assistance to those legal services attorneys who have litigated the due process issues of access to utility service. Our participation has included appearance as *Amicus* in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973) and in *Jackson* v. *Metropolitan Edison Co.*, 483 F.2d 754 (3d Cir. 1973). In addition, the Center has included a chapter on residential utility service deposits and eligibility in its *Consumer Law Handbook*. Most recently, the Center has published comprehensive *Model Residential Utility Service Regulations* which have been used by legal services attorneys and state regulatory agencies.

The Center's interest in the action before the Court is the product of our substantial work in this area and our recognition that poor consumers are directly affected by the summary termination practices of utility corporations throughout the United States. The poor, unemployed, underemployed, elderly, and disabled frequently face the harsh impact and life threatening hazard which results from summary termination of utility service. They are not able to take advantage of the pay now—sue later remedy which is available to more affluent consumers. Without the procedural safeguards mandated by the Fourteenth Amendment, they are left to needlessly suffer loss of a necessity of life where termination is the result of error, mistake, or arbitrary conduct.

The Center offers a perspective which is not available from the parties to this action. Since 1969, we have engaged in significant litigation and legislative development

in consumer protection generally and in the due process implications of summary termination of residential utility service in particular. The national scope of our program has brought an experience with the issues before the Court which enables us to suggest practical resolution of this matter. Moreover, we have direct experience with the action before the Court, having participated in the appeal before the third circuit.

The National Consumer Law Center therefore submits that it has a significant interest in the action before this Court and an experience which enables it to present a brief *Amicus Curiae* which will aid the Court in its deliberations.

Respectfully submitted,

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26 April 1974

Pursuant to Rule 42 of the Rules of the Supreme Court, Advocates For Basic Legal Equality, Inc. (ABLE) and the Ohio State Legal Services Association also apply to the Court for leave to file the enclosed brief *Amicus Curiae* in support of the Petitioner, Catherine Jackson.

ABLE is a *private*, nonprofit legal services program serving the Toledo area. Its attorneys have represented the class plaintiffs in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 342 F. Supp. 241 (N.D. Ohio W.D. 1972), 479 F.2d 153 (6 Cir. 1973), a residential utility service termination action which has raised issues similar to those before this Court. Ohio State Legal Services Association is a statewide legal services program which has appeared as *Amicus Curiae* before the court of appeals in *Palmer* v. *Columbia Gas* and has been substantially involved in judicial and administrative litigation to apply procedural safeguards to residential utility service.

Given their direct involvement with issues similar to those before the Court, ABLE and the Ohio State Legal Services Association have a significant interest in the action before this Court and an experience which enables these programs to present a brief *Amicus Curiae* which will aid the Court in its deliberations.

Respectfully submitted,

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26 April 1974

STATEMENT OF THE ISSUE

At issue here is the asserted right to prior notice and opportunity to contest a proposed termination of residential utility service. Petitioner claims that residential utility service is a property interest and entitlement to a necessity of life which, by law, must be extended to all consumers subject only to reasonable conditions of eligibility and payment. And where, as in the Commonwealth of Pennsylvania, that service is provided by a utility corporation which is engaged in a public function, subject to substantial regulatory control, joint beneficiary of a state created monopoly, and required to conform its service and termination practices to a statutory standard of reasonableness and regulatory review, the state's involvement is of such substance as to subject the corporation's affairs to the Fourteenth Amendment. Acting under color of law, the corporation cannot, therefore, terminate residential utility service without compliance with minimum requisites of due process of law.

STATEMENT OF THE CASE

Petitioner Catherine Jackson brought an action under the Civil Rights Act, 42 U.S.C. § 1983, on behalf of herself and all others similarly situated against the Respondent Metropolitan Edison Company, a regulated Pennsylvania utility corporation. Seeking damages, injunctive, and declaratory relief, Petitioner has challenged the corporation's practice of summary termination of residential utility service upon its allegation of nonpayment, abuse, fraud, or tampering and without notice of and opportunity to contest. Petitioner asserts that this challenged termination procedure, pursuant to the corporation's *Electric Tariff No. 41*, fails to comply with the requisites of procedural due process of law under the Four-

teenth Amendment to the Constitution of the United States.

The district court dismissed the complaint for failure to state a cause of action under the Civil Rights Act. Characterizing the challenged practice as the product of internal corporate action without specific authorization by the Commonwealth of Pennsylvania, the court ruled that Metropolitan Edison does not act under color of law. 348 F. Supp. 954 (M.D. Pa. 1972).

On appeal to the third circuit, Petitioner objected to the district court's narrow analysis of the issue of state action. Petitioner argued that government is not neutral where a utility corporation is engaged in a public function, subject to substantial regulatory control, beneficiary of a state authorized monopoly, and required by statute to conform its service and termination practices to a statutory standard of reasonableness and regulatory review. Nor is government neutral where it is a direct economic beneficiary of a utility corporation's business practices. And government is not neutral where its grant of monopoly status creates substantial economic advantage to the corporation and denies alternative sources of residential utility service to consumers.

Upon review, the court of appeals ignored these indices of action under color of law and affirmed the decision below. 483 F.2d 754 (3d Cir. 1973). It viewed government action as limited solely to a regulatory requirement that Metropolitan Edison file its internal tariff regulations with the Public Utility Commission. 483 F.2d at 758. The court also rejected Petitioner's argument that residential utility service is a protected property interest to which the fundamental safeguards of the Fourteenth Amendment apply. It therefore dismissed Petitioner's claim as *de minimus* and of no concern to the federal judiciary.

SUMMARY OF THE ARGUMENT

Under contemporary conditions and in our highly technological society, light, heat, power, water, and communications services are prime necessities of life, any one of which may affect health, livelihood, and life itself. Yet summary termination of residential utility service annually affects countless thousands of residential utility consumers throughout the United States. The practice is characterized by impersonal bureaucracy, computer error, inefficiency, and unresponsiveness. Its failure of procedural safeguard and simple fairness leads to erroneous, mistaken, and arbitrary denial of service to those citizens who can least afford this loss. The result is life-threatening hazard to those who cannot afford the 'pay now—sue later' remedy suggested by the court of appeals in this case.

Utility corporations have largely avoided procedural safeguards in the past because they have been uncritically defined as private businesses. Now, however, it is urged that these public enterprises are not private corporations in the ordinary sense of the term. A multi dimensional analysis of the indices of state action defined by this Court demonstrates that the private label is an unwarranted shield against the Fourteenth Amendment's requirement of fair dealing.

In the case before the Court, it is noted first that Metropolitan Edison is a state created, protected, and controlled monopoly. This government monopoly represents a relationship between the state and corporation which cannot be compartmentalized as private or public; indeed, the two are merged in fact. And this merger results in an identity of purpose and conduct and a mutual economic advantage from which neither public nor private can be separated. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Monopoly also results in restricted access enforced by the state. It differs from the mere license found in *Moose Lodge 107* v. *Irvis*, 407 U.S. 163 (1972), in that the direct and immediate result of government's creation of the monopoly is a complete denial of alternative sources of utility service. The Commonwealth of Pennsylvania has put the weight of its authority behind the practices of a single corporation and has transformed what in the market economy is a mere refusal to deal into an absolute denial of a necessity of life. Therefore, its monopoly has legitimized, facilitated, and given the force and effect of law to that denial.

Beyond the fact of monopoly, state action is apparent in the pervasive regulation of every significant aspect of Metropolitan Edison's business. Moreover, there is specific statutory—regulatory authorization for the summary termination practices contested here. Finally, there is the fact that the corporation is engaged in a public function in providing residential utility service in behalf of the Commonwealth of Pennsylvania.

The conclusion which follows from this collective assessment is inescapable. Metropolitan Edison is not a private business in the ordinary sense. As a government created, protected, and controlled monopoly, it is joined with the Commonwealth to carry out a public purpose for public benefit. It acts under color of law. It is therefore held to the mandate of due process of law. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

I. THE PURPOSE OF THIS LITIGATION IS TO ATTAIN PRACTICAL DUE PROCESS SAFEGUARDS FOR THOSE CONSUMERS WHO FACE ERRONEOUS, MISTAKEN, OR ARBITRARY DENIAL OF RESIDENTIAL UTILITY SERVICE

The following letter was sent to the Hartford Gas Company in February 1891.

> Dear Sirs:
>
> Some day you will move me almost to the verge of irritation by your chuckle-headed Goddamned fashion of shutting your Goddamned gas off without giving any notice to your Goddamned parishioners. Several times you have come within an ace of smothering half of this household in their beds and blowing up the other half by this idiotic, not to say criminal, custom of yours. And it has happened again today. Haven't you a telephone?
>
> Ys. S.L. Clemens
>
> —Mark Twain's Notebook, (Harper & Row)

A. Summary Termination Of Residential Utility Service Is An Issue Of National Scope

As the foregoing reference to Mark Twain indicates, summary termination is an historical issue. It is also a problem of national scope which annually affects many thousands of residential customers of utility corporations. The summary termination remedy has, until recently, been a universal practice of public utilities throughout the United States. It is dictated by a corporate concern for protection of assets. It is characterized by impersonal bureaucracy held together by computers, where inefficiency and a high level of error are the norm and unresponsiveness the only remedy. Yet its failure of procedural safeguard and simple fairness leads to erroneous, mistaken, and arbitrary denials of utility service to those who can least afford this loss.

Amicus urges the Court's attention to the scope of the issues presented here. Summary denial of utility services is an issue which extends far beyond the Petitioner or the class of 300,000 consumers whom she represents. It is an issue of societal import.

In Toledo, for example, a utility corporation serving 140,000 customer accounts issued 120,000 - 140,000 shut-off notices annually. Of these, 6,000 (4% of the corporation's accounts) resulted in termination. The court of appeals described the utility's collection and termination procedures as far worse than imperfect and characterized the results of those procedures as having a potential for tragedy. *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 158 (6th Cir. 1973). Typical of the experiences cited by the court of appeals is that of a father of seven children who pleaded with a collections employee to restore his utility heating service which had been terminated after full payment of the account. The employee responded, "Tough. Pay the bill again." *Palmer* at 158. The temperature in the man's home reached 45° before intervention of an influential community representative caused restoration of the service. Other customers of the corporation suffered termination in the face of disputed accounts, current accounts, admittedly erroneous billing, and even accounts which had been paid in full. Only the intervention of ministers and important community persons seemed capable of gaining restoration of service to some of these consumers.

Adopting the district court's evaluation of the utility's practices, the court of appeals concluded:

> The evidence as a whole revealed a rather shockingly callous and impersonal attitude upon the part of the defendant, which relied uncritically upon its computer, located in a distant city, and the far from infallible clerks who served it, and paid no attention

to the notorious uncertainties of the postal service. *Palmer* at 158.

In New York City, Consolidated Edison's collection and termination practice has been described by the district court as a bizarre "Orwellian nightmare". There, a 76 year old widow, upset at a sudden and drastic increase in the amount of her electric bill, caused an investigation to be made which resulted in the discovery by the utility company that her landlord had diverted current through her meter. Nevertheless, the higher bills continued for six months at which time her service was terminated for refusal to pay the excess amount. After living in the dark for three weeks, she obtained emergency assistance from the welfare department and paid the bill. However, Consolidated Edison lost the check, re-entered the deficit upon her account, and again threatened to terminate her service. *Bronson* v. *Consolidated Edison Co. of New York, Inc.*, 350 F. Supp. 443, 444, 445 (S.D.N.Y. 1972). Thereupon, she obtained counsel and sought injunctive relief against the corporation. So shoddy was Consolidated Edison's accounting, however, that, in defense, it asserted no record of the plaintiff as a customer. *Bronson* at 445.

In Atlanta, a municipal water utility terminated service to a tenant who refused to pay his slum landlord's delinquent account even though the tenant offered to pay for all current and future service to his residence. *Davis* v. *Weir*, 328 F. Supp. 317, 318 (N.D. Ga. 1971), 359 F. Supp. 1023 (1973). In St. Paul, San Francisco, Presque Isle (Maine), and Boston, tenants were similarly terminated without warning or notice because of landlord failure to pay delinquent accounts. *See Jackson* v. *Northern States Power Co.*, 343 F. Supp. 265 (D. Minn. 1972); *Freeman* v. *Frye*, Civil No. C-72-350 (N.D. Calif. 31 Oct. 1972); Proceedings before Public Utilities Commission, State of Maine, *Proposed General Order 36* (Jan.

1974); *Hanrihan* v. *Boston Edison Co.*, Civil No. 72-3900T (D. Mass., filed Jan. 1973).

In Denver, a husband and wife faced summary termination at their new residence because of an arrearage at their former residence which had admittedly resulted from the utility's metering error. The customers offered to pay the arrearage in instalments while continuing to pay their current account in full. The offer was rejected; they were told to "pay or else"; and their service was terminated. *Hattell* v. *Public Service Co. of Colorado*, 350 F. Supp. 240, 241 (D. Colo. 1972).

In Milwaukee, where the Wisconsin Electric Power Company annually terminates 10,000 accounts for alleged nonpayment (2% of its 600,000 accounts), a customer who disputed a billing charge of $9.89 faced termination of his residential service without having been afforded the opportunity for impartial hearing to contest that charge. *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972).

The actions described here are typical of the numerous judicial and administrative cases which have litigated the collection and termination practices of utility corporations throughout the United States during the past five years. Without question, these cases demonstrate that the issue of erroneous, mistaken, and arbitrary termination is of societal scope. These cases demonstrate also that utility corporations, in their singular dedication to the balance sheet, have ignored both the rule of fundamental fairness and the harsh impact of summary termination.

B. Procedural Safeguards Are Necessary To Protect This Necessity Of Life

Because summary collection and termination practices are directed at the poor, the severe consequences of denial of utility services are often unnoticed in the larger so-

ciety. *See generally* Shelton, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 Wash. L. Rev. 745, 748-752 (1971). Those who have not lived under the threat of termination dismiss the fact of termination as if loss of service were of little more consequence than loss of a 50 cent lottery ticket. *See* opinion below at 759. Until some dramatic event such as this winter's exposure deaths thrusts reality to the fore, we fail to recognize that loss of residential utility service is an absolutely life threatening hazard to the poor, disabled, unemployed, and those of modest income who cannot afford the 'pay now—sue later' remedy suggested by the court of appeals. *See* opinion below at 760.

Under contemporary conditions and in our highly technological society, light, heat, power, water, and communication services are prime necessities of life, any one of which may affect health, livelihood, and life itself. The loss of telephone service, for example, is a threat to life for an elderly person who relies upon his telephone to reach emergency medical assistance. Similarly, the loss of electrical service is a harrowing and frightening experience to a widow in New York City. And the loss of heat is a threat to health and life for a mother and her two children who face illness and exposure after termination of that service.

Were utility service a mere consumer convenience, necessary for proper operation of televisions and frost-free refrigerators, the termination practices of Metropolitan Edison would not be challenged before this Court. That, however, is not the case.

> The evidence leaves no doubt whatever that the consequences of shutting off gas service inflicts hardships upon the consumer that far transcend the loss of driving privileges, *Bell* v. *Burson*, 402 U.S. 535 90 (1971), delay in paying unemployment compensation, *California Dept. of Human Resources Devel-*

> *opment* v. *Java*, 402 U.S. 121 (1971), or even the denial of direct relief payments, *Goldberg* v. *Kelly*, 397 U.S. 263 (1970). A person can freeze to death or die of pneumonia much more quickly than he can starve to death. *Palmer* v. *Columbia Gas of Ohio, Inc.*, 342 F. Supp. 241, 244 (N.D. Ohio W.D. 1972).

This winter's energy shortages have confirmed our society's real dependence upon utility services. A highly technological society simply cannot revert to a nineteenth century lifestyle of kerosene lanterns and wood burning fireplaces. Indeed, a shortfall of 12% has resulted in a severe economic downturn, loss of 250,000 jobs, and substantial hardship to many Americans. Contrasting this shortfall with the complete loss and denial which results from termination of utility services, it is apparent that loss of residential utility service is loss of a necessity of life and a life threatening hazard. It is apparent also that utility service should not be denied without safeguards to consumers.

C. Practical Safeguards Are Not Subversive Of Private Business

> The right to public utility services may not rank with the franchise, or with procedural due process in criminal cases, on a conventional scale of liberties, but to the poor or disadvantaged nothing may be more immediately important than fair treatment by those who supply the needs of their daily existence. William F. Eich, Chairman, Public Service Commission of Wisconsin, *Public Power* 32 (Nov. 1973).

The safeguards advocated here are nothing more than practical implementation of our historic commitment to fundamental fairness and the rule of law. Due process attempts only to protect consumers from mistaken, erroneous, or arbitrary denial of utility services. Contrary to the rhetoric of utility corporations, due process is not a radical effort to bankrupt private business. *See*, in this

regard, the argument of Consolidated Edison in *Bronson*, 350 F. Supp. at 448. Nor is it a naive, unworkable attempt to institutionalize the Fourteenth Amendment mandate of fairness.

In the first instance, the cost of due process is not likely to bankrupt utility corporations because it is a cost of service which can be borne by consumers through the rate structure. *See* Bonbright, *PRINCIPLES OF PUBLIC UTILITY RATES* 66 (1961). Nor is due process a radical concept except insofar as fair dealing is a noval concept for many utility corporations. And due process is not an attack upon the legitimate freedom of private business. The state created, state protected, and state regulated monopoly is not a traditional private business in the open market. At best, a utility corporation is a hybrid, more akin to a government authority than it is to a competitive private business in the market economy. Therefore, the utility's use of a private business label should not shield it from the mandate of the Fourteenth Amendment.

Finally, due process is not an unworkable concept. Its practicality is readily demonstrated in those jurisdictions which are implementing a variety of review and hearing procedures for residential utility service consumers. *See generally Massachusetts Department of Public Utilities Regulation*, DPU No. 16696; *Michigan Public Service Commission Regulations Governing Consumer And Billing Practices* (1974); *New York Public Service Commission Opinion No. 73-16* (9 May 1973); *Vermont Public Service Board General Order 57* (1974); *City of Youngstown Health Department Water Service Regulations* (1973). *See also* the relief directed by the court in *Palmer* v. *Columbia Gas*, Civil No. (72-14, N.D. Ohio, W.D., Memorandum and Order, 5 April 1974), and the Model Regulations drafted by *Amicus*. *Model Residential Utility Service Regulations* (National Consumer Law

Center, Inc., Boston, 1974). Most comprehensive of these are the Michigan, Vermont, and Model Regulations which provide a right to informal review and impartial hearing *prior* to termination of service.

II. A PUBLIC UTILITY CORPORATION WHICH IS A JOINT BENEFICIARY OF A GOVERNMENT CREATED, PROTECTED, AND CONTROLLED MONOPOLY; ENGAGED IN A PUBLIC FUNCTION; SUBJECT TO SUBSTANTIAL REGULATION; AND REQUIRED TO CONFORM ITS PRACTICES TO AN AFFIRMATIVE STATUTORY STANDARD OF REASONABLENESS ACTS UNDER COLOR OF LAW WHERE IT TERMINATES RESIDENTIAL UTILITY SERVICE WITHOUT PRIOR NOTICE AND OPPORTUNITY TO BE HEARD

A. The Issue Of Action Under Color Of Law Requires A Comprehensive, Multi-Dimensional Analysis Of The Scope, Extent, And Substance Of Government Involvement With Challenged Practices

Although the opinion below first suggests adoption of the broad, flexible, and comprehensive approach mandated by *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), the court of appeals has, in fact, embraced a narrow, fixed concept of action under color of law. Following a similar decision in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 655 (7th Cir., 1972), its opinion focuses upon a one dimensional index, that of specific governmental authorization for and direction of the challenged practices of Metropolitan Edison. Yet even there, when faced with a statute which clearly satisfies that index, the court dismisses it as a mere notice filing requirement which does not clothe the utility's termination tariff with the force and effect of law. 483 F.2d at 758. *See* hereinbelow at Part II B 3.

More importantly, perhaps, the court's approach overlooks several additional and significant indices which demonstrate state action in this case. It dismisses the monopoly position of Metropolitan Edison without question as to the significance of the Commonwealth of Pennsylvania's creation, protection, and control of that monopoly. Similarly, it dismisses the fact of mutual economic benefit which is conferred upon the utility corporation and the Commonwealth by statute. It does not recognize the pervasive regulatory scheme which necessarily involves the state of the challenged practices of Metropolitan Edison. And it ignores the fact that the utility corporation is engaged in a public function. In short, the court of appeals has eschewed the multi dimensional approach of *Burton* and has dismissed or ignored these several indices of state action which are relevant to its inquiry.

The issue of action under color of law is not so limited as the court of appeals would have it. There is no singular test or index which is to be applied to consumer due process actions. Rather, state action is a function of a range of factors which collectively demonstrate the scope, extent, and substance of government involvement with participation in, and relation to challenged practices. This is the rule of *Burton* and its most recent restatement, *Moose Lodge 107* v. *Irvis*, 407 U.S. 163, 172 (1972). *See also United States* v. *Guest*, 383 U.S. 715, 723-725 (1966). And among the recognized factors which are relevant to this action are monopoly and economic interdependence, *Burton*, *Moose Lodge;* substantial regulation, *American Communication Assn. C.I.O.* v. *Douds*, 339 U.S. 382 (1950), *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952); direct governmental authorization or encouragement for challenged conduct, *Pollak*, *Evans* v. *Newton*, 382 U.S. 296 (1966), *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); and public function or

governmental purpose, *Marsh* v. *Alabama*, 326 U.S. 501 (1946), *Burton*.

The courts of appeals' approach is clearly inconsistent with the decisions of this Court. The opinion below declines comprehensive consideration of every variable which is relevant to the issue of the termination practices of Metropolitan Edison. Had the court given substantive review to each of the indices set forth herein, it would have been compelled to the conclusion that the involvement of the Commonwealth constitutes action under color of law and therefore subjects Metropolitan Edison to the Fourteenth Amendment requirement of fairness and due process of law.

B. A Comprehensive Analysis Of State Action Should Consider The Relevance And Collective Significance Of Monopoly, Mutual Economic Benefit, Substantial Regulation, Statutory Authorization, And Public Function

Notwithstanding the private business label which the court of appeals has seized as a shield for Metropolitan Edison, it is evident that substance belies both the label and the shield. Simply stated, Metropolitan Edison is not a private business in the ordinary meaning of that term. It is, rather, a government monopoly engaged in the public function. It shares a structural and economic interdependence with the Commonwealth of Pennsylvania and is largely controlled and protected from competition and financial loss by the Commonwealth of Pennsylvania. Moreover, it is pervasively regulated in every significant aspect of its business. In short, neither the utility corporation nor government can be separated, one from the other. Therefore, the residential termination practice of Metropolitan Edison carries the force and effect of law rather than the mere economic force and effect of a private corporate act. It is action under color of law.

1. *Metropolitan Edison And The Commonwealth Act As Joint Participants In And As Joint Economic Beneficiaries Of A Government Monopoly*

Metropolitan Edison was chartered and issued a certificate of convenience, in the first instance, to serve the public interest rather than the private interests of its incorporators. Unlike the private corporation, it exists solely at the will of government. 66 P.S. § 1171. Unlike the private corporation, it holds an exclusive franchise within its service area and is not subject to competition and the private controls of the market economy. 66 P.S. §§ 1121 *et seq.* Unlike the private corporation, it is guaranteed a fair rate of return by the state's regulatory rate structure. 66 P.S. §§ 1141-1148. Unlike the private corporation, it functions under pervasive statutory and regulatory controls which far exceed those to which private business is subject.

Private capital, competition, and influence govern the open market and distinguish private action from government action. These private controls further distinguish the market economy from the closed market in which a public utility operates. It is government which has established the closed market, which controls access to and operation in the market, which substantially regulates it, and which is the source of economic influence in the market. Moreover, it is government's grant of monopoly, rather than private investment, which is the basic source of a utility's existence, funding, and profitability in that market. The utility monopoly thus represents a basic restructuring of the market from private to government control.

This government monopoly may be viewed as analogous to a municipal utility, government corporation, or government authority. Each of these functions in a closed, government market. In each, it is the government charter, franchise, or monopoly which is the source of the

entity's existence. While each may be the object of substantial private investment, that investment is predicated upon the entity's possession of an exclusive charter, franchise, or monopoly. And to the extent that government is the source of the entity's existence and control, its actions are the actions of government where fundamental rights are at issue. *See*, for example, *Meredith* v. *Allen County War Memorial Commission*, 398 F.2d 33, 35 (6th Cir. 1968) [county hospital]; *Holmes* v. *New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968 [public housing authority]; *Davis* v. *Weir*, *supra*, 328 F. Supp. at 321 [municipal utility].

At the very least, the government monopoly represents a relationship between the state and corporation which cannot be compartmentalized as private or public; indeed, the two are merged in fact. *See Stanford* v. *Gas Service Co.*, 346 F. Supp. 717, 721-722 (D. Kan. 1972); *Bronson* v. *Consolidated Edison*, 350 F. Supp. at 445; *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566, 569-570 (8th Cir. 1972). This merger results in an identity of purpose and conduct from which neither public nor private can be separated. It could not be otherwise; given the aversion to monopoly in American law, a monopoly lawfully exists not as a private business but only to the extent that it is subject to public control and acts for a public purpose. Therefore, the act of the utility corporation is the act of the state, for government "has so far insinuated itself into a position of interdependence with the [corporation] that it must be recognized as a joint participant in the challenged activity, which on that account cannot be considered to have been so purely private as to fall without the scope of the Fourteenth Amendment". *Burton*, 365 U.S. at 275.

Beyond this interdependence, there is a further, perhaps more significant result which rises from the fact of government monopoly, that of restricted access enforced

by the state. Monopoly differs from the mere license found in *Moose Lodge* in that the direct and immediate result of government's creation of the monopoly is a complete denial of alternative sources of utility service. In contrast to the finding in *Moose Lodge*, Catherine Jackson has no opportunity to take her business elsewhere. The Commonwealth has put the weight of its authority behind the practices of a single corporation and has transformed what in the market economy is a mere refusal to deal into an absolute denial of a necessity of life. *Moose Lodge*, 407 U.S. at 177. Its monopoly has legitimized, facilitated, and given the force and effect of law to that denial. The exercise of the state created power to effect that denial is therefore action under color of law. Its arbitrary exercise is a denial of due process of law.

Finally, it should be noted that this government monopoly also generates mutual economic advantage to the corporation and the state. The benefit to Metropolitan Edison is apparent in its exclusive franchise and guaranteed fair rate of return. 66 P.S. §§ 1121, 1122, 1123, 1141, *et seq.* Unlike the private business, Metropolitan Edison is not subject to vagaries of the open market. Insulated from competition and the risk of a market economy, it is the beneficiary of substantial economic advantage in the form of a favorable balance sheet assured by government. Similarly, the advantage to the Commonwealth is undeniable. Not only does the state receive the substantial benefit of general corporate income taxes levied upon utilities, but, more importantly, the Commonwealth is the direct beneficiary of special tax revenues from the gross receipts tax which is levied *exclusively* upon public utility corporations. 72 P.S. § 8101.

The court of appeals has erred in ignoring the significance of monopoly and economic benefit. This Court's

decisions have attributed prime importance to these indices of public action. The lower court's dismissal of these factors as unrelated to the issue of the Commonwealth's relation to challenged conduct cannot stand in the face of *Burton*, 365 U.S. at 723, 724, and *Moose Lodge*, 407 U.S. at 174, 177. *See also Ihrke* v. *Northern States Power Co.*, 459 F.2d at 568, 569. The interdependence evidenced by monopoly and economic advantage is action under color of law.

2. *Government Is Directly Involved Where The Utility's Termination Tariff Has Been Framed Pursuant To A State Standard Of Reasonableness And Is Subject To State Review, Authorization, And Approval*

The court of appeals held that Metropolitan Edison's termination procedure is merely the product of internal corporate action without acquiescence of or authorization by the Commonwealth of Pennsylvania. The only state involvement found by the court is a Public Utility Commission regulation, *Tariff Reg. No. VIII*, which requires utility corporations to set forth the conditions of service termination for nonpayment of accounts. This requirement, the court ruled, is not sufficient state involvement to satisfy the state action requirement. 483 F.2d at 758.

Tariff Reg. No. VIII, however, is not the only state regulation to be considered here. Not only has the court ignored the fact of pervasive regulation, but it has overlooked specific statutory authorization for the challenged practice. The Public Utility Code, 66 P.S. § 1171, state *inter alia*:

> Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service . . . .

Together with filing requirements of *Tariff Reg. No. VIII*, this statute subjects utility regulations governing conditions of service and termination to the regulatory authority of the Public Utility Commission. It requires the utility to adopt regulations acceptable to and to be approved by the commission. It mandates a *statutory* standard of reasonableness. It subjects the corporation's regulations to the enforcement and compliance authority of the commission. 66 P.S. §§ 1341, 1343, 1347.

Pursuant to section 1171, Metropolitan Edison has promulgated *Electric Tariff No. 41* which provides its unchecked authority to terminate utility service for alleged nonpayment, abuse, fraud, or tampering. This tariff has been formally presented to the Public Utility Commission under its requirements governing submission of proposed tariffs. *Tariff Reg. Nos. I, II.* And, it has been accepted and approved pursuant to the affirmative statutory requirement, 66 P.S. § 1342, which directs the commission to enforce all provisions of the Public Utility Code, including the reasonableness standard of section 1171.

It is evident that section 1171 directly and significantly involves the Commonwealth with the challenged practices. The statutory provision goes far beyond the simple notice-filing requirement of *Tariff Reg. No. VIII* cited by the court: the Public Utility Commission is to define the standard of reasonableness; it is to review proposed regulations; it is to accept or reject these regulations. Once having required, reviewed, accepted, and approved the challenged tariff, the commission has vested *Tariff No. 41* with the apparent authority of the Commonwealth and clothed the termination practice with the legitimacy of law and an authority which could not otherwise be exercised apart from compliance with sections 1171, 1342 and *Tariff Reg. Nos. I, II.* Therefore, the tariff is no less an index of specific authorization than

was the termination statute recognized in *Palmer* v. *Columbia Gas*, 342 F. Supp. at 245, or the regulatory agency's approval in *Pollak*.

> [W]hen authority derives in part from government's thumb on the scales, the exercise of that power becomes closely akin, in some respects to its exercise by government itself. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 462, n.8 (1952).

Compare Moose Lodge, 407 U.S. at 175, where there was no direct or specific governmental authorization for the discriminatory conduct of the private club. In that case, the Commonwealth's involvement was limited to a general licensing requirement.

It may be argued in rebuttal that the commission has not formally ratified Metropoliton Edison's *Tariff No. 41* and therefore has not specifically approved its substance. That argument is without merit. The commission is under a statutory mandate to review proposed tariffs for compliance with section 1171. 66 P.S. §§ 1341, 1342. Whether the review is a formal or informal process is irrelevant to the issue of specific authorization. Certainly, there exists no rule which would have the issue of specific authorization turn on a distinction between formal and informal review. It is enough that the tariff has been submitted, as required, for review and approval. Not having been rejected formally or otherwise, the tariff is in effect and carries the approval and authority of the Commonwealth as a tariff which meets the statutory standard of reasonableness. Without that approval and authority, it would have no force and effect and could not serve as justification for Metropolitan Edison's termination practices.

3. *Government Is Directly Involved In The Challenged Practices Of The Monopoly Which It Pervasively Regulates*

Metropolitan Edison is not the typical business entity which is subject to some regulation by the state. Rather, its general managerial function is subject to substantial governmental intervention and control by statute, administrative regulation, and the Public Utility Commission. Subject to statutory regulation under the Public Utility Code are its rates, 66 P.S. §§ 1141 *et seq.;* services and facilities, 66 P.S. §§ 1171 *et seq.;* termination of service, 66 P.S. § 1171; accounting and budgetary matters, 66 P.S. §§ 1211 *et seq.;* securities and obligations, 66 P.S. §§ 1241 *et seq.;* relations with affiliated interests, 66 P.S. §§ 1271 *et seq.* Subject to administrative regulation by the Public Utility Commission are its tariffs, deposits, service charges, payment and termination procedures, discounts, complaints, records, systems operation, testing, electric cooperative associations, accounts and records. 66 P.S. §§ 452 *et seq.;* 66 P.S. §§ 1341 *et seq.; Pennsylvania Public Utility Rules And Regulations Governing Matters Pertaining To Tariffs (1962); Pennsylvania Publice Utility Commission Electric Regulations (1968).*

Government intervention and control of Metropolitan Edison is nothing short of pervasive. The corporation cannot operate or transact any business as a public utility without statutory authorization. Every significant part of its business as a utility is subject to comprehensive statutory and administrative regulation which reaches well beyond that to which a business corporation in the open market is subject. And broad enforcement authority is granted to the Public Utility Commission to compel corporate compliance with the Public Utility Code and regulations. 66 P.S. §§ 452 *et seq.;* 66 P.S. §§ 1341 *et seq.;* 66 P.S. §§ 1491 *et seq.*

This Court has repeatedly recognized close regulation as a primary index of action under color of law. When the state is "entwined in the management or control" of an entity or where that entity derives power from the state's regulatory intervention, it remains subject to the restraints of the Fourteenth Amendment. *Evans* v. *Newton*, 382 U.S. 296, 301 (1966); *American Communications Assn. C.I.O.* v. *Douds*, 339 U.S. 401 (1950). *See also Public Utilities Commission* v. *Pollak*, 343 U.S. at 462.

Similarly, several federal courts have adopted pervasive regulation as a key factor in the determination of action under color of law. Notably, the Court of Appeals for the Eighth Circuit has applied this index to a utility corporation's termination practices. *Ihrke* v. *Northern States Power Co.*, 459 F.2d at 568. That court adopted the concurring opinion in *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F.2d 624 (7th Cir. 1969):

> [I]t may be possible to demonstrate that a privately-owned publicly-regulated utility or carrier or similar entity has a sufficient nexus with or dependence on a state as to make some of its actions under color of law. Some of the factors which should be considered are whether (1) the entity is subject to close regulation by a statutorily-created body, (2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, (3) the regulations must be approved by the regulatory body to be effective, (4) the entity is given a total or partial monopoly by the regulatory body, (5) the regulatory body controls the rates charged and/or specific services offered by the entity, (6) the actions of the entity are subject to review by the regulatory body, and (7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law. There may be other factors to be considered besides those here enumerated. The enumeration here of particular factors means that less than all may be sufficient to show

color of law in some cases and that nothing less than all may be required in other cases. Each case will depend on its facts. 407 F.2d at 628. *See also Palmer* v. *Columbia Gas*, 342 F. Supp. at 245; *Stanford* v. *Gas Service Co.*, 346 F. Supp. 717, 721, 722 (D. Kan. 1972); *Bronson* v. *Consolidated Edison Co.*, 350 F. Supp. at 445, 446; *McQueen* v. *Drucker*, 438 F.2d 781, 784-785 (1st Cir. 1971).

Metropolitan Edison meets the substantial regulation prerequisites suggested by the concurring opinion in *Kadlec* and adopted by *Ihrke* and related cases: (1) the corporation is subject to close regulation by the Public Utility Commission; (2) the corporation must file its regulations with the Public Utility Commission as a condition of operation, 66 P.S. §§ 1142, 1171; (3) these regulations must be approved by the Public Utility Commission to be effective, 66 P.S. § 1171; (4) the corporation is the beneficiary of a state granted monopoly in its service area, 66 P.S. §§ 1121 *et seq.*; (5) the corporation's rates and services are controlled by the Public Utility Commission, 66 P.S. §§ 1141 *et seq.*; (6) the corporation's activities are subject to review by the Public Utility Commission, 66 P.S. § 1171; (7) the corporation is permitted to engage in business as a public utility and monopoly which it could not undertake without government authorization.

The opinion below dismisses the fact of pervasive regulation as insufficient to link the Commonwealth to the conduct of Metropolitan Edison. The error in the court's judgment is its failure to consider substantial regulation in the context of a range of variables which collectively demonstrate state action. Substantial regulation does not stand alone. In particular, the combination of government regulation, government monopoly, and specific authorization is the direct nexus between the state and what otherwise might be private conduct. Here it can be said that the fact of regulation, monopoly, and